

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ELAINE ANDREWS, et al.,

No. C 11-3930 CW

Plaintiffs,

ORDER GRANTING
PLAINTIFFS' MOTION
TO REMAND AND FOR
ATTORNEYS' FEES
(Docket No. 15)

v.

LAWRENCE LIVERMORE NATIONAL
SECURITY, LLC, et al.,

Defendants.

This dispute arises from Plaintiffs' terminations in the course of a May 2008 workforce reduction conducted by Defendant Lawrence Livermore National Security, LLC (LLNS), a contractor for the United States Department of Energy (DOE).¹ LLNS is charged with managing and operating the federally-owned Lawrence Livermore National Laboratory, pursuant to a contract with the DOE National Nuclear Security Administration. LLNS removed this action from Alameda County Superior Court on August 10, 2011, after it had been removed and remanded once before. Plaintiffs move for an order again remanding the case and requiring LLNS to pay the attorneys' fees and costs that Plaintiffs have incurred as a result of the removal. Plaintiffs' motion to remand is GRANTED.

¹ Plaintiffs originally named individual Defendants, George Miller and Robert Perko, in addition to LLNS. However, on November 5, 2009, the Court dismissed with prejudice all claims against Miller and Perko, pursuant to the parties' stipulation. LLNS is the sole remaining Defendant.

1 Plaintiffs are also awarded fees, although the Court will
2 determine the amount after the parties submit supplemental
3 briefing.

4 BACKGROUND

5 Plaintiffs filed their complaint in Alameda County Superior
6 Court on May 21, 2009, and on July 30, 2009, they filed their
7 First Amended Complaint, asserting causes of action under state
8 law for violations of the California Fair Employment and Housing
9 Act, breach of an implied contract and other claims. Plaintiffs
10 also alleged claims under federal law, including discrimination in
11 violation of the Age Discrimination in Employment Act (ADEA) and a
12 constitutional claim.
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14 A DOE contractor may conduct a layoff when the DOE has made a
15 "determination that a change in the workforce . . . is necessary"
16 and develops a plan for workforce restructuring in consultation
17 with affected stakeholders. See National Defense Authorization
18 Act for Fiscal Year 1993, Pub. L. No. 102-484, Div. C, Title XXXI,
19 § 3161, 106 Stat. 2315 (1992) (originally codified at 42 U.S.C.
20 § 7274h, then transferred to 50 U.S.C. § 2704); 48 C.F.R.
21 § 970.2672-1. Federal regulations provide that "in instances
22 where the [DOE] has determined that a change in workforce at a
23 [DOE] Nuclear Facility is necessary, DOE contractors . . . shall
24 accomplish workforce restructuring or displacement . . . in a
25 manner consistent with any DOE work force restructuring plan in
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1 effect . . ." 48 C.F.R. § 970.2672-1. The parties refer to the
2 DOE's workforce restructuring plan as the "3161 Plan."

3 Plaintiffs alleged that "LLNS is governed by the provisions
4 of Section 3161(c) of the National Defense Authorization Act for
5 Fiscal Year 1993, which requires it to take measures to minimize
6 the impact of a reduction in force . . ." and that the "entire
7 reduction in force is invalid, illegal and discriminatory, in
8 violation of State and Federal law, Department of Energy and other
9 governmental policies and regulations and Defendants' own policies
10 and procedures." FAC ¶¶ 2 and 5.

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12 On September 3, 2009, Defendants LLNS, Miller and Perko filed
13 the first notice of removal, on the basis of federal question
14 jurisdiction. On November 5, 2009, pursuant to the parties'
15 stipulation, the Court remanded the action to state court. The
16 stipulation provided that Plaintiffs would dismiss with prejudice
17 their claims under the ADEA and their constitutional claim, as
18 well as their claims against Miller and Perko. Declaration of J.
19 Gary Gwilliam, Ex. U at 3. The stipulation also stated that "each
20 of the Plaintiffs, through their counsel, further agree that they
21 will not assert any other claims that would fall within the
22 jurisdiction of this Court, including but not limited to any
23 claims based on any statute, constitutional provision, contract or
24 on any other basis, against any Defendant named in this
25 litigation . . ." Id. In turn, LLNS agreed "not to remove this
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1 case unless Plaintiff [sic] asserts claims that fall within the
2 jurisdiction of the federal courts." Id.

3 On December 9, 2009, the parties filed a Joint Complex Case
4 Management Statement in state court in which Plaintiffs asserted
5 that "the entire layoff is illegal and must be set aside,
6 regardless of the individual claims of discrimination that each
7 Plaintiff can prove. . . [and] that [LLNS] failed to minimize the
8 impact of the layoffs on its workforce, as required by Section
9 3161(c) of the National Defense Authorization Act of FY 1993."
10 Id., Ex. V at 8.

11 On June 2, 2010, in connection with a motion to compel LLNS
12 to produce additional documents, Plaintiffs argued that LLNS was
13 required to analyze any proposed layoffs for possible disparate
14 impact on protected classifications of employees. Id., Ex. W at
15 10. According to Plaintiffs, the adverse impact analysis was
16 required pursuant to the DOE's obligations under Executive Orders
17 11246 and 12086. Id.

18 In February 2011, LLNS served special interrogatories on
19 Plaintiffs. Before Plaintiffs responded, the parties scheduled
20 four days of mediation in June 2011. All discovery was stayed
21 until after the mediation. The parties' efforts to resolve the
22 lawsuit were unsuccessful, and discovery resumed.

23 On August 3 and 5, 2011, Plaintiffs responded to LLNS'
24 special interrogatories. In doing so, Plaintiffs confirmed their
25 contention that the reduction in force violated the 3161 Plan and
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1 DOE policies and regulations. Id., Ex. Y at 8-9. Plaintiffs
2 identified the following provisions as the basis for their
3 contention: (1) the 3161 Plan governing the layoff, (2) the DOE's
4 "Planning Guidance for Workforce Restructuring," DOE Order O
5 350.1, (3) the regulations governing DOE Management and Operating
6 Contracts, 48 C.F.R. Part 970 et seq., and (4) Executive Order
7 11246, as amended by Executive Order 12086 and 48 C.F.R. Part I et
8 seq. Id.

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10 Also on August 3, 2011, LLNS filed in state court a Motion
11 for Summary Adjudication Regarding Whether the Layoff was
12 Necessitated by a Lack of Funds. Id., Ex. AA. In connection with
13 the motion, LLNS argued that the DOE's finding that the layoff was
14 necessary had been made in accordance with section 3161, and that
15 Plaintiffs were precluded from challenging the DOE's determination
16 that a layoff was necessary. Id. at 10-12. LLNS asserted that
17 "whether a layoff is necessitated by a lack of funds is, as a
18 matter of law, left to the DOE's sole discretion. LLNS' function,
19 in contrast, is to participate in the 3161 process as required by
20 DOE and to conduct a layoff consistent with the 3161 Plans."² Id.
21 at 11. A hearing on the motion for summary adjudication was set
22 for August 31, 2011.

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24 On August 10, 2011, LLNS removed the action to federal court
25 for a second time.

27 ² According to LLNS, a General 3161 Plan and a Specific 3161
28 Plan were created.

LEGAL STANDARD

A defendant may remove a civil action filed in state court to federal district court so long as the district court could have exercised original jurisdiction over the matter. 28 U.S.C. § 1441(a). Title 28 U.S.C. § 1447 provides that if at any time before judgment it appears that the district court lacks subject matter jurisdiction over a case previously removed from state court, the case must be remanded. 28 U.S.C. § 1447(c). On a motion to remand, the scope of the removal statute must be strictly construed. See Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992). "The 'strong presumption' against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper." Id. (internal citation omitted). Courts should resolve doubts as to removability in favor of remanding the case to state court. See id. Ordinarily, federal question jurisdiction is determined by examining the face of the plaintiff's properly pleaded complaint. Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987).

Removal of an action to federal court must be timely. Pursuant to 28 U.S.C. § 1446(b), notice of removal of a civil action "shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based." However, "[i]f the case stated by the initial pleading is not removable, a notice of removal may be

1 filed within thirty days after receipt by the defendant, through
2 service or otherwise, of a copy of an amended pleading, motion,
3 order or other paper from which it may first be ascertained that
4 the case is one which is or has become removable." Id.

DISCUSSION

I. Motion for Remand

6 At the outset, the parties dispute whether this Court has
7 subject matter jurisdiction over this case, as required to justify
8 removal pursuant to 28 U.S.C. § 1441(a). Plaintiffs have
9 dismissed their federal law causes of action. However, LLNS
10 argues that Plaintiffs allege state law claims that give rise to
11 federal jurisdiction.
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14 This Court has federal question jurisdiction under 28 U.S.C.
15 § 1331 over state law claims "that implicate significant federal
16 issues." Grable & Sons Metal Prods., Inc. v. Darue Engineering &
17 Mfg., 545 U.S. 308, 312 (2005). With respect to such a state law
18 claim, the Supreme Court has explained that
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20 federal jurisdiction demands not only a contested
21 federal issue, but a substantial one, indicating a
22 serious federal interest in claiming the advantages
23 thought to be inherent in a federal forum. But even
24 when the state action discloses a contested and
25 substantial federal question . . . the federal issue
26 will ultimately qualify for a federal forum only if
27 federal jurisdiction is consistent with congressional
28 judgment about the sound division of labor between state
and federal courts governing the application of § 1331.

Id. at 313-14 (internal citations omitted). The absence of a
federal private right of action is "evidence relevant to, but not

1 dispositive of, the 'sensitive judgments about congressional
2 intent' that § 1331 requires." Id. at 318.

3 LLNS contends that significant federal issues are implicated
4 by Plaintiffs' intent to prove their state law claims for breach
5 of contract and discrimination by showing that LLNS violated the
6 federally-required 3161 Plan and certain federal regulations.
7 These claims, however, do not involve a substantial federal
8 question or require a resolution of a contested issue of federal
9 law. According to Plaintiffs' theory, the 3161 Plan, once
10 adopted, and DOE regulations served as implied-in-fact terms of
11 the contract between LLNS, as employer, and Plaintiffs, as its
12 employees. Under California law, "the employer's personnel
13 policies and practices may become implied-in-fact terms of the
14 contract between employer and employee. If that has occurred, the
15 employer's failure to follow such policies when terminating an
16 employee is a breach of the contract itself." Guz v. Bechtel Nat.
17 Inc., 24 Cal. 4th 317, 352 (2000). The parties agree that LLNS
18 was required to follow the 3161 Plan and DOE regulations. LLNS
19 has failed to identify a substantial dispute between the parties
20 as to the meaning of the plan or of federal regulations. Instead,
21 the parties dispute whether LLNS failed to comply with the plan
22 and, if so, whether its failure amounts to a breach of contract or
23 provides evidence of discrimination. Therefore, to resolve the
24 breach of contract claim, the state court would need only to
25 determine the requirements of the plan and DOE regulations and
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1 whether LLNS complied with them, applying contract principles
2 under California law. The court would also need to consider
3 whether any non-compliance by LLNS evidences discrimination.

4 The present action is distinguishable from Grable, 545 U.S.
5 at 312. There, the Internal Revenue Service seized Grable's
6 private property to satisfy a tax delinquency and sold the
7 property to the defendant. Id. at 310-311. Grable brought a
8 quiet title action against the defendant in state court, claiming
9 that the defendant's title was invalid because the IRS failed to
10 provide Grable adequate notice of the seizure under a provision of
11 the Internal Revenue Code. Id. at 311. The defendant removed the
12 action to federal court, claiming that the suit turned on the
13 interpretation of a federal statute. The Supreme Court found
14 federal jurisdiction because the construction of a federal tax
15 statute concerning adequate notice was required and the parties
16 actually disagreed about the statute's meaning. Id. at 314-15.
17 The Court also noted that the federal government had a "direct
18 interest in the availability of a federal forum to vindicate its
19 own administrative action." Id. at 315.

20 Here, the federal government's interest in the mitigation of
21 adverse impacts associated with workforce reduction efforts by DOE
22 contractors is narrower than its interest in Grable, where the
23 interpretation of the notice provision implicated the government's
24 efforts to collect outstanding taxes. Furthermore, as noted
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1 earlier, LLNS has not identified a substantial dispute as to the
2 meaning of the 3161 Plan or a particular federal regulation.

3 The parties also agree that section 3161 does not confer a
4 private right of action. The absence of a private right of action
5 under section 3161 indicates that Congress did not intend that
6 non-compliance with this provision would give rise to federal
7 jurisdiction. Merrell Dow Pharmaceuticals Inc. v. Thompson, 478
8 U.S. 804, 814 (1986) ("Given the significance of the assumed
9 congressional determination to preclude federal private remedies,
10 the presence of the federal issue as an element of the state tort
11 is not the kind of adjudication for which jurisdiction would serve
12 congressional purposes and the federal system.").

14 Indeed, this case is similar to Merrell Dow, 478 U.S. at 804,
15 in which the Supreme Court found an absence of federal
16 jurisdiction. There the plaintiffs pursued a cause of action for
17 negligence under state law. An element of the claim was a
18 violation of the Federal Food, Drug, and Cosmetic Act. Id. at
19 805-06. The Court reasoned that "the mere presence of a federal
20 issue in a state cause of action does not automatically confer
21 federal-question jurisdiction." The federal issue in the tort
22 claim was not substantial enough to render it a claim arising
23 under federal law. Id. at 813-14.

26 Likewise, the Court in Empire Healthchoice Assurance, Inc. v.
27 McVeigh reasoned that a contract-derived claim did not warrant
28 federal jurisdiction, even though a federal statute contemplated

1 the contract at issue and the "United States no doubt 'has an
2 overwhelming interest in attracting able workers to the federal
3 workforce.'" 547 U.S. 677, 696, 699-701 (2006). The Court
4 explained that a contract authorized by federal statute "is not a
5 prescription of federal law." Id. at 696.

6 Just as in Merrell Dow and Empire Healthchoice, the state law
7 claims in the present case do not support federal jurisdiction
8 because they do not implicate substantial federal concerns.
9 Accordingly, LLNS has failed to establish federal question
10 jurisdiction in this action.

11 Even if Plaintiffs' claims gave rise to federal jurisdiction,
12 LLNS has waived its right to remove the case by taking action to
13 adjudicate the matter in state court. "A party, generally the
14 defendant, may waive the right to remove to federal court where,
15 after it is apparent that the case is removable, the defendant
16 takes actions in state court that manifest his or her intent to
17 have the matter adjudicated there, and to abandon his or her right
18 to a federal forum." Resolution Trust Corp. v. Bayside
19 Developers, 43 F.3d 1230, 1240 (9th Cir. 1994). LLNS agreed to
20 remand the case to state court in September, 2009, even though
21 Plaintiffs' first amended complaint made clear the federal
22 elements of their state law claims. These elements remained part
23 of the action even after Plaintiffs agreed to dismiss their
24 federal age discrimination and constitutional claims. LLNS then
25 permitted the case to remain in state court for nearly two years.

1 On August 3, 2011, LLNS sought summary adjudication in state court
2 that the DOE had found that the layoff was necessary in accordance
3 with section 3161 and that Plaintiffs were precluded from
4 challenging the DOE's determination. In doing so, LLNS sought to
5 litigate the merits of the claims, including the federal aspects
6 of the claims. It still did not assert that the 3161 Plan was a
7 basis for removing the action.

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9 LLNS responds that the removability of the claim did not
10 become apparent until after it filed its motion for summary
11 adjudication. This argument fails because the federal aspects of
12 Plaintiffs' claim have been apparent throughout the litigation.
13 The November 2009 stipulation could not have been reasonably
14 understood as an agreement by Plaintiffs to forgo their state law
15 breach of contract claim based on the theory that LLNS failed to
16 comply with the 3161 Plan or other federal requirements. The
17 Joint Complex Case Management statement filed the following month
18 and Plaintiffs' discovery motion filed in June 2010 made plain
19 that Plaintiffs continued to pursue legal theories related to
20 federal requirements. LLNS waived any right to remove the action
21 by actively litigating the case in state court after the first
22 removal and remand, although the federal aspects of the case were
23 apparent. Plaintiffs' August 3 and 5, 2011 discovery responses
24 did not reveal any new information rendering the case removable.

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26 Furthermore, LLNS' notice of removal is untimely because it
27 occurred well after thirty days from the date that removability
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1 would have been ascertainable from the papers filed in this
2 action. 28 U.S.C. § 1446(b).

3 In sum, LLNS' second removal of this action was improper due
4 to the absence of federal jurisdiction, LLNS' waiver of
5 removability and the untimeliness of the notice of removal.
6 Plaintiffs' motion to remand the action to Alameda County Superior
7 Court is granted.

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9 II. Motion for Attorneys' Fees and Costs

10 On granting a motion to remand, the court may order the
11 defendant to pay the plaintiff its "just costs and any actual
12 expenses, including attorney fees, incurred as a result of the
13 removal." 28 U.S.C. § 1447(c). "Absent unusual circumstances,
14 attorney's fees should not be awarded when the removing party has
15 an objectively reasonable basis for removal." Martin v. Franklin
16 Capital Corp., 546 U.S. 132, 136 (2005).

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18 Here, Defendant's notice of removal lacked any objective
19 basis. It is not a close call. Therefore, an award of attorneys'
20 fees and costs incurred in connection with this improper removal
21 is warranted.

22 However, the party seeking an award of attorneys' fees bears
23 the burden of producing "satisfactory evidence--in addition to the
24 attorney's own affidavits--that the requested rates are in line
25 with those prevailing in the community for similar services by
26 lawyers of reasonably comparable skill, experience and
27 reputation." Camacho v. Bridgeport Financial, Inc., 523 F.3d 973,
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1 980 (9th Cir. 2008). Although J. Gary Gwilliams attests that his
2 rate has been approved by two judges in the complex litigation
3 departments of Alameda and Contra Costa counties, there is no
4 further evidence to support his or his colleagues' rates.
5 Furthermore, the number of hours must be reasonable. The number
6 of hours of service indicated in the fee request appears
7 excessive. Plaintiffs shall submit contemporaneous billing
8 records and an explanation of the number of hours of service
9 required to complete a fifteen page motion and fourteen page reply
10 brief.
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12 Accordingly, by September 6, 2011, Plaintiffs shall submit a
13 supplemental brief, not to exceed three pages, and supporting
14 documentation to address their fee and cost request. LLNS may
15 oppose the request in a brief, not to exceed three pages, which
16 shall be submitted by September 13, 2011. The matter will be
17 decided on the papers.
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CONCLUSION

Plaintiffs' motion to remand the case to Alameda County Superior Court is GRANTED. The clerk shall remand the file.

Plaintiffs' motion for attorneys' fees and costs is also GRANTED, although the Court will determine the amount of the award after the parties have filed their supplemental briefing.

IT IS SO ORDERED.

Dated: **8/31/2011**


CLAUDIA WILKEN
United States District Judge